

INTERIM REPORT NO. 25

DISABILITY RETIREMENT

AND

WORKERS' COMPENSATION

BENEFITS REPORT

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REPORT OF THE

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I.

SUMMARY

The City of San Diego has a history of employees, mainly police officers and fire fighters, obtaining disability retirements after filing a series of workers' compensation claims. This is sometimes referred to as the "Golden Handshake" amongst people familiar with this system. The process starts with the injured worker filing a series of workers' compensation claims, usually for cumulative trauma type injuries, once he or she is nearing eligibility for a service retirement. The injured worker then goes to a doctor of his choosing, who finds him or her to be a Qualified Injured Worker, "QIW." Once the employee is deemed to be QIW by the Workers' Compensation Appeals Board, "WCAB," the employee proceeds to the San Diego City Employees Retirement System, "SDCERS," and files a disability retirement application based upon the same injuries alleged in his or her workers' compensation claim.

The reason employees attempt to get a disability retirement is that the first 50 percent of the employees retirement benefit is tax free. The argument on behalf of the injured worker is that since this worker was already eligible for a service retirement the disability retirement status is not costing SDCERS or the City any more money. The retiree gets the greater of 50 percent of the base pay or service retirement. However, the issue which needs to be addressed is that the employee is receiving benefits from the City of San Diego for his or her workers' compensation benefits and SDCERS for his or her disability retirement benefits and both benefits are based upon the same injuries, thus the "Golden Handshake." This issue has been addressed in the Final Report of the City Manager's Committee to Review the Disability Retirement System, dated April 14, 2005, and in the "Double Payments of Workers' Compensation and Retirement Benefits" memorandum submitted January 30, 2004, regarding the practice of the "Golden Handshake."

II.

INTRODUCTION

The San Diego City Employees Retirement System, "SDCERS," is the retirement system for the City of San Diego. This system is governed by California State Constitution Article XVI, Section 17, the San Diego City Charter¹, and the San Diego Municipal Code.² The retirement system provides for disability retirements for industrial and non-industrial injuries. A disability retirement is a benefit available if an employee becomes permanently disabled by bodily injuries or sickness to such an extent that he or she must retire from active City employment. The injury or disease must be caused primarily by the performance of the employee's job with the City of San Diego. If the employee was hired after September 2, 1982, the employee is not eligible to receive an industrial disability retirement for a condition arising from stress, a mental disorder or a pre-existing medical condition. There are no age or service requirements for an industrial disability retirement.

This report will address only the industrial disability retirements and how they compare and contrast with similar provisions in the workers' compensation system. The workers' compensation system is governed by the California Labor Code. Obviously, the City of San Diego cannot amend the California Labor Code; however, because our retirement system is controlled in part by the San Diego City Charter and the San Diego Municipal Code, the City of San Diego can change the retirement system.

III.

LABOR CODE AND DISABILITY STATUS

The California Labor Code has a provision for a disability pension if the injured worker's permanent partial disability is 70 percent or higher.³ This means a pension for life based upon the workers' compensation disability rating. This has not been a problem area in the past because most of the time when the injured worker has a disability rating over 70 percent he or she does have legitimate injuries. The troublesome area arises when the injured worker is declared QIW, which means the injured employee is no longer capable of performing in his or her usual occupation or the duties to which he or she was assigned at the time of the injury.

¹ San Diego City Charter Article IX Sections 141 – 148.1 and Article X, Section 1, attached hereto as Exhibit 1.

² San Diego Municipal Code Sections 24.0100 et seq., attached hereto as Exhibit 2.

³ California Labor Code Section 4659, attached hereto as Exhibit 3.

The California Labor Code⁴ provides that workers' compensation law shall be "liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Therefore, the difficulty is that the WCAB can readily characterize the injured employee, especially a safety member, a Qualified Injured Worker, "QIW." This would be based upon the treating physician's recommendation. Furthermore, this procedure enables the injured worker to enhance their City disability retirement application with the finding of a state administrative body holding that the employee is unable to perform his or her job.

IV.

SAN DIEGO CITY EMPLOYEES RETIREMENT SYSTEM (SDCERS)

SDCERS is unique in its approach to industrial disability retirements. The City of San Diego is a charter city and has codified the requirements for a disability retirement in the San Diego City Charter and the San Diego Municipal Code, "SDMC." Unlike its counterparts in the Public Employees' Retirement System⁵, the 1937 Act County Retirement Systems,⁶ or various other charter provisions with accompanying municipal or county code provisions, the SDMC⁷ requires the incapacity to be the result rather than a result of the workplace (*emphasis added*). This distinction was addressed by the courts in *Gurule v. Board of Pension Commissioners*⁸, which emphasized the difference between the wording of "the" result as opposed to "a" result of the employment. In addition, for those members enrolled in SDCERS on or after September 3, 1982, the incapacity may not "arise from a preexisting condition or a nervous or mental disorder."

SDCERS rules for industrial disability retirements are more restrictive than those adopted by other public agencies, such as the county or state systems. The San Diego Municipal Code⁹ expressly excludes pre-existing conditions and nervous or mental disorders as a basis for an industrial disability award. Under the City's standard, the incapacity must be the result of the workplace. In other words, disability retirement will not be given to employees with pre-existing conditions that are partially the cause of the incapacity. This is contrary to the county system where the pre-existing conditions do not preclude the disability retirement.¹⁰

⁴ California Labor Code Section 3202, attached hereto as Exhibit 4.

⁵ Public Employees' Retirement System (Government Code Section 21020), attached hereto as Exhibit 5.

⁶ 1937 Act County Retirement Systems (Government Code Section 31720), attached hereto as Exhibit 6.

⁷ San Diego Municipal Code Section 24.0501, attached hereto as Exhibit 7.

⁸ *Gurule v. Board of Pension Commissioners*, 126 Cal. App. 3d 523, 527 (1981), attached hereto as Exhibit 8.

⁹ San Diego Municipal Code Section 24.0501(b), attached hereto as Exhibit 7.

¹⁰ *Gelman v. Board of Retirement*, 85 Cal. App. 3d 92, 97 (1978), attached hereto as Exhibit 9.

These are important differences and allowable because of the charter city status. As a charter city, the City “can make and enforce all ordinances and regulations regarding municipal affairs subject only to the restrictions and limitations imposed by the city charter, as well as conflicting provisions in the United States and California Constitutions and preemptive state law,” according to *Grimm v. City of San Diego*.¹¹ Significantly, charter cities are given full power to provide for the compensation of their employees under the California Constitution.¹² “It is clear that provisions for pensions relate to compensation and are municipal affairs within the meaning of the Constitution.”¹³

The express exclusion for pre-existing conditions is just the opposite of the workers’ compensation system, which has as its paramount rule that the employer takes his employee as he finds him. This position is true for workers’ compensation disability cases and perhaps also for industrial disability retirements for State or County employees covered by their respective public retirement systems, but is not the case for industrial disability retirements under SDCERS.¹⁴

The pre-existing condition requirement which is acceptable at the WCAB but not acceptable for SDCERS has been a hot topic among the attorneys representing applicants over the years. The attorneys representing the retiree applicant want the more liberal WCAB standard to apply at the retirement hearing. These attorneys often cite the fact that the Government Code¹⁵ provides that the Public Employees Retirement System (PERS) has been designated to determine whether the injury of a governmental employee is industrial. Applicants’ attorneys have requested that the retirement board adopt a similar provision so that the findings of the workers’ compensation board with regards to qualified injured worker status are a determinative factor for the disability retirement status to be determined by SDCERS. While there is one SDMC section¹⁶ that does provide that the WCAB can make findings to determine whether or not the death of an active member was industrially caused, this does not extend to disability status.¹⁷

¹¹ *Grimm v. City of San Diego*, 94 Cal. App. 3d 33, 37 (1979); see also *Bellus v. City of Eureka*, 69 Cal. 2d 336, 345-346 (1968), attached hereto as Exhibit 10.

¹² California Constitution, Article XI, Section 5, subdivision (b), attached hereto as Exhibit 11.

¹³ *Grimm*, p. 37, attached hereto as Exhibit 10.

¹⁴ See generally *Gurule v. Board of Pension Commissioners*, 126 Cal. App. 3d 523, 526-529 (1981); *Gelman v. Board of Retirement*, 85 Cal. App. 3d 92, 96-98 (1978); attached hereto as Exhibits 8 and 9.

¹⁵ Government Code Section 21166, attached hereto as Exhibit 12.

¹⁶ San Diego Municipal Code Section 24.0705, attached hereto as Exhibit 13.

¹⁷ *Mauzy v. Workers’ Comp. Appeal Bd. (City of San Diego)*, 70 Cal. Comp. Cas. (MB) 1725 (Cal. App. 4th Dist. 2005), attached hereto as Exhibit 14.

The problem case often cited by the attorneys litigating the disability retirement is *Roccaforte v. City of San Diego*.¹⁸ In this case, the court ruled that the City could not have it both ways. The City could not tell a police officer that he was not qualified to do his job, QIW, on the one hand and then deny his industrial retirement on the other hand. The *Roccaforte* decision was decided in 1979 and the court considered the police department's decision and the Retirement Board's decision to be both part of the City's organization. This is not the case today as SDCERS retirees are not City employees. Another case also used for the position that the retirement board should follow the WCAB findings is *Greatorex v. Board of Administration*.¹⁹ In *Greatorex* the court found that the city was bound by collateral estoppel to contest the stipulation that the firefighter's injuries were caused by work.

Roccaforte and *Greatorex* were both superceded by *Bianchi v. City of San Diego*.²⁰ This office was successful in obtaining a ruling in the case of *Bianchi*, in a holding that directly stated that the San Diego City Retirement System is not bound by any findings at the Workers' Compensation Appeals Board. The Court found that the San Diego City Employees Retirement System was not a party to the workers' compensation proceedings, and therefore, not bound by their findings. The major differences between SDCERS and the workers' compensation system is that the standard for a qualified injured worker and the standard for a disability retirement are entirely different.

V.

PRESENT DIABILITY RETIREMENT STATUS

The group of eligible employees of retirement age would also start to experience the normal affects of aging. The service eligible members are obviously older today than when they joined the City twenty years ago. It is simply an aging process that one's body may not be as strong or flexible today as it was twenty years ago. Likewise, one might be more susceptible to internal maladies, such as high blood pressure, today than he or she was when he or she was a younger individual. It is also true that problems such as cancer, hypertension and heart irregularities manifest themselves with the aging process. This makes it rather simple for the fiftyish employee to file a workers' compensation claim for cumulative trauma for a sore back, high blood pressure, or carpel tunnel problems, all of which are difficult to prove non-existent. If the employee says his back hurts, an MRI is not conclusive as to whether or not the employee feels pain.

In addition, safety personnel have the benefit of several presumptions under the Labor Code.²¹ These presumptions include, but are not limited to, cancer, heart,

¹⁸ *Roccaforte v. City of San Diego*, 89 Cal. App. 3d 877 (1979), attached hereto as Exhibit 15.

¹⁹ *Greatorex v. Board of Administration* (City of San Diego), 91 Cal. App. 3d 54 (1979), attached hereto as Exhibit 16.

²⁰ *Bianchi v. City of San Diego*, 214 Cal. App. 3d 563, 569 (1989), attached hereto as Exhibit 17.

²¹ California Labor Code Section 3212 et seq., attached hereto as Exhibit 18.

pneumonia, hernia, blood-borne diseases and low back. These injuries are presumed to be work related for safety officers and make it rather easy for the safety officer to have a compensable claim.

When an employee approaches retirement, the injured worker through his attorney selects the appropriate doctor(s) who will make the desired findings (this otherwise working employee has several disabilities which make him a qualified injured worker). This is where the problem lies, if the injured worker can no longer perform the duties of his job, should he not be eligible to retire? The SDMC places the higher burden upon the retiree applicant. It is certainly arguable that safety members are more prone to injuries from the nature of their jobs than other members of the work force and coupling that with the presumptions listed above, it is reasonable to see the workers' compensation claims being an incentive for additional monies.

The City Managers Committee from the spring of 2005 examined the issue by quantifying the ratio of disability retirements to the overall retirements for safety members and general members:

Disability Retirements make up approximately 22.4 percent (1,231/5,500) of all SDCERS retirements. Of those, General Members Disability Retirements make up roughly 8 percent (436/5,500) and Safety Members Disability Retirements make up roughly 14.4 percent (795/5,500). Safety Members constitute 64.6 percent (795/1,231) of the total Disability Retirements and 34.5 percent (795/2,300) of Safety Members are on a Disability Retirement.

| | All Retirements | Regular Retirements | Disability Retirements |
|-----------------|-----------------|---------------------|------------------------|
| General Members | 3,200 | 2,764 | 436 |
| Safety members | 2,300 | 1,505 | 795 |
| All Retirees | 5,500 | 4,269 | 1,231 |

It is important to note that there is no difference in the amount of money the City pays for a service retirement or a disability retirement if the employee qualifies for a service retirement because of his age and years of service. The amount an employee receives for a service retirement is a percentage based on years of service and rate of compensation. The amount an employee receives for a disability retirement is 50 percent of final compensation for safety members and 33 1/3 percent of final compensation for general members. Thus, the employee who qualifies for a service retirement is entitled to whichever amount is greater. The difference is that an employee with a disability retirement receives the first

50 percent of their disability income tax exempt, until age 65, pursuant to Federal Internal Revenue Code.²²

There is a higher ratio of disability retirements for safety members than general members. As of 2005 there were a total of 1,505 safety employee retirements, which included 795 disability retirements, which means about 52.8 percent of the safety members received disability retirements. This is compared to the a total of 2,764 general member retirement, of which 436 general members received disability retirements, or 15.8 percent. The question is why are there so many disability retirements for safety members as compared to general members? The answer lies in the generous presumptions in the Labor Code, with which the WCAB is bound and which the City does not control.

This trend has continued. In the time frame from June 30, 2006 to June 30, 2007, there were a total of 130 service retirements, of which 22 disability retirements were granted. Safety members accounted for 29 retirements, of which 14 were disability retirements, or 48.2 percent. General members accounted for 101 retirements, of which 8 were disability retirements, or 7.9 percent. Further analysis revealed that the 14 safety members that received disability retirements in this time frame had filed a total of 38 workers' compensation claims within the last 5 years before the disability retirement.²³

At one time, the Police Department had permanent-light duty positions for officers with disabilities. This would include positions such as juvenile detective, desk sergeant, and telephone report units. However, the permanent light duty positions were abolished in the early 1990's. Currently, police officers can work in light duty until their disability retirement status has been determined, a process that can take up to two years. Other City departments do not appear to have similar programs. Once an employee is determined QIW by their workers' compensation doctor, their options are limited to filing for either a service or disability retirement, or resigning.

Another problem is that the same generous workers' compensation presumptions for safety officers extend the statute or limitation for injuries up to five years beyond the last day worked.²⁴ A safety member can file a workers' compensation claim while retired and receive double recovery. The workers' compensation benefits, including compensation for temporary and permanent disability are in addition to the monthly disability retirement checks. For example, a doctor can determine an employee is unable to work while recovering from an injury, such as a heart attack, even though the officer has been retired for a number of years. Pursuant to the Labor Code, the City must pay temporary total disability benefits for this retired employee. At the same time, the

²² Final Report, The City Manager's Committee to Review the Disability Retirement System, April 14, 2005, p. 3, attached hereto as Exhibit 19.

²³ Retirement and Workers' Compensation Spreadsheet, attached hereto as Exhibit 20.

²⁴ California Labor Code Section 3212 et seq., attached hereto as Exhibit 18.

employee is collecting disability retirement checks from SDCERS. Currently, there is no City statute or code precluding this double recovery.

VI.

POSSIBLE SOLUTIONS

The City's disability retirement benefits are intended to provide a source of income for injured employees that can no longer participate in the labor market. If a disability retiree is still able to work and earn money, that monetary amount should be set off against the disability retirement. In addition, disability retirees should not be able to receive a double recovery from the City under the workers' compensation and the retirement system. Possible solutions include setting off amounts received from workers' compensation or outside employment, and requiring periodic physical exams to determine if the retiree is still disabled.

A. Add A Workers' Compensation Set-off to the Municipal Code

In August 1978, the City of San Diego added SDMC section 24.0515²⁵ as the solution to the double payment of benefits. That code section provided that compensation (workers' compensation) shall not be cumulative with any industrial disability retirement allowance provided for in this article. Such workers' compensation benefits were set off against any disability retirement payments. However, that code section was later modified by subsection (b) which stated that "the requirement to set off any compensation received in the nature of workers' compensation shall not be applicable to safety members from and after January 1, 1988." That exclusion was extended to general members, by subsection (c), effective July 1, 1989. Currently, the City's Municipal Code regulations do not require that workers' compensation benefits be set off against disability retirement payments.

If the City were to re-enact a regulation which provides that:

[A]n award of compensation shall be made or compensation shall be paid on account of injury or sickness caused by or arising out of employment as an employee of The City of San Diego that compensation shall not be cumulative with any industrial disability retirement allowance provided for in this article. Such compensation, as may be awarded, shall be set off against any disability retirement pension payments which is the obligation of the City.

The worker, if injured, could still file his workers' compensation claim and receive his benefits, but it would be set off against his disability retirement benefits. This would not only save the City Treasury money, but would also reduce the obligations of the

²⁵ San Diego Municipal Code Section 24.0515(a), attached hereto as Exhibit 7.

retirement fund. In the 1980's, the worker's compensation administrator was required to send notices to the retirement system advising them how much money the injured workers were receiving from workers' compensation, so it could be set off against the retirement allotment. SDMC 24.0515 (a) is still in force. The easiest way to resolve the matter would be to repeal sections 24.0515 (b) and (c).

In order to repeal subsections (b) and (c) of SDMC section 24.0515, the City would be required to meet and confer in good faith with the employee bargaining units because this change involves wages, hours and working conditions, pursuant to the Meyers-Milias-Brown Act.

B. Require Periodic Physical Exams of Disability Retirees

A second measure the City should utilize is SDMC section 24.0510²⁶, involving periodic physical exams of disability retirees. This regulation is currently in force. With periodic exams by unbiased doctors some of these questionable disability retirements could be eliminated. For example, a disability retiree police officer took a job with a corporation providing police services in Iraq. His medical reports indicated he needed additional back surgery upon returning from Iraq, which was paid for by the City under the workers' compensation provisions. Attempts in a deposition to obtain information about his employment with this overseas agency were denied and upheld by the local WCAB Judge. It is rather strange that an individual who has a disability retirement for a bad back with the San Diego Police Department, is capable of going to work for an agency that has rigorous fitness requirements and does business in a hostile environment. Another example is the police officer who received a disability retirement from the City of San Diego, and then went to work in another local agency as a high level police officer.

C. Require A Set-off For Other Income Received By Disability Retirees

In addition to the provision requiring periodic physical exams, disability retirements should be discontinued for any period of time the disabled employee participates in similar work with another agency, or at least be set off for the amount of money the disabled employee receives from outside income. This would apply to other sources of income as well. Any other source of income coupled with the disability retirement income, which exceeds the pre-injury level of income, would be set off against the City's retirement benefit for purposes of reducing the total benefits to the pre-injury level. Admittedly, enforcement may be difficult but tax returns might be one way to determine outside sources of employment.

²⁶ San Diego Municipal Code Section 24.0510, attached hereto as Exhibit 7.

VII.

CONCLUSION

The system, as it is now, allows the employee to apply for his service retirement and receives benefits immediately and at the same time request the disability retirement pursuant to Rule 17b. The present state of the law also allows the retiree to receive his disability retirement benefits and at the same time receive workers' compensation benefits from the City via the Labor Code. This is a question that the claim representatives in the City's Risk Management department routinely ask: "Why do we have to pay TTD (temporary total disability) if the worker is retired or has a disability retirement?" The answer is that currently the City is restricted by the liberal Labor Code and the (b) and (c) provisions of SDMC section 24.0515.

The City cannot control the provisions of the Labor Code, but it can control the provisions within SDMC. By re-enacting those provisions allowing the set off for workers' compensation benefits against any disability retirement benefits, the City would be able to prevent the "double recovery" where the retired worker receives his disability and at the same time receives his temporary total disability or partial permanent disability payments from the City. The temporary total disability rate at the present time is \$881.66 per week for a maximum wage earner. Safety members are maximum wage earners. By allowing this process to go forward, we are draining the City budget on one side and the retirement funds on the other side.

By:



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